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In The

Supreme Court of the United States

October Term, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER AND OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY IN SUPPORT OF RESPONDENTS

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STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in the opinion of the court of appeals (Pet. App. A2-A4).

SUMMARY OF ARGUMENT

Cases involving the interaction of religion and government often present difficult First Amendment issues that divide this Court. But two principles are clear from the Court's decisions. On one hand, under the Establishment Clause, government may not specially promote religion. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989). On the other hand, individual citizens and private groups have the constitutional right to promote religion themselves – to express and advocate their religious views – on the same terms as citizens of other views. The right to express religious views in public discussion and debate is central to both the Free Speech and Free Exercise Clauses, as this Court has long recognized. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (both clauses); *Widmar v. Vincent*, 454 U.S. 263 (1981) (Free Speech); *McDaniel v. Paty*, 435 U.S. 618 (1978) (Free Exercise).[1]

[1] Indeed, many of this Court's seminal decisions protecting freedom of speech involved religious speech, particularly by Jehovah's Witnesses. Moreover, the framers and proponents of the Fourteenth Amendment were deeply concerned with protecting religious speech, such as abolitionists had engaged in, against state action. Amar, Akhil, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1278-80 (1992).

In order for the various provisions of the First Amendment to coexist – to respect freedoms of religious speech and exercise while avoiding government establishments – courts must draw a sharp distinction between speech by government and by private citizens. "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

Under the First Amendment, citizens' speech may not be censored on the ground that its content is religious; when government permits speech reflecting other viewpoints, it is constitutionally forbidden to exclude religious speech. *Widmar, supra; Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141 (1993). This case calls on the Court to reaffirm the protection of citizens' religious speech against content-based discrimination in a public forum. Respondents were prohibited from displaying a cross in Capitol Square (concededly a public forum where numerous groups have spoken) solely because the cross is a religious symbol. Any restrictions on access to a traditional public forum are subject to the strictest scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Petitioners, the state officials, justify their suppression of this religious expression on the ground that some observers might think the state was endorsing the religious message represented by a cross. This is yet another refrain of a tune this Court has heard countless times before, and has rejected each time. When a forum for expression is open to a wide variety of organizations, the

fact that the government holds the forum in trust for the people "does not confer any imprimatur of State approval on religious sects or practices." *Widmar*, 454 U.S. at 274; *see also Lamb's Chapel*, 113 S. Ct. at 2148; *Mergens*, 496 U.S. at 248-49.

The equal access principle fully controls this case. There is no basis for distinguishing an expressive display from the meetings that this Court held are protected in *Widmar*, *Lamb's Chapel*, and *Mergens*. Petitioners argue that some observers who see an unattended religious symbol close to government buildings will conclude that government sponsors or endorses the religious message. But such misperceptions are not reasonable and cannot serve as the basis for content-based suppression of religious speech. Avoiding unreasonable misperceptions does not justify the very real silencing of religious speech. The remedy for misinformed observers is more information, not censorship.

The fear that some observers would perceive a state endorsement of religion is the only ground on which Petitioners defend their exclusion of the cross. That ground applies to any group erecting a religious display. Therefore, it is legally irrelevant to this case that the group displaying the cross is the Ku Klux Klan. The state officials do not claim power here to regulate speech that inflicts harms through racial, gender, or religious bigotry. *Cf. R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). Moreover, state officials "do not contend that the erection of the cross poses a security risk of any kind" that would justify regulation. Pet. App. A16.

Petitioners' argument for unique disabilities on private religious speech suggests that, ironically, the cross is more problematic to the state of Ohio than is the Klan. Under Petitioners' argument, a racially offensive display by the Klan would be constitutionally protected while the cross would be forbidden. This Court should put an end to such anomalous, discriminatory treatment of religious speech.

ARGUMENT

I. PETITIONERS' EXCLUSION OF RESPONDENTS FROM A TRADITIONAL PUBLIC FORUM CONSTITUTES A *PRIMA FACIE* VIOLATION OF THE FREE SPEECH CLAUSE.

Petitioners and their supporting *amici* understandably de-emphasize the central fact of this case: that the government excluded protected private speech from a traditional public forum based upon its content. By proceeding directly to the supposed justification therefor, they minimize the constitutional gravity of this act of censorship.

Despite this tactic, it simply cannot be avoided that the government in this case barred a message from a space that has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Orgs.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring). There is no dispute that Capitol Square is such a public forum: as the court of appeals

found, "[o]ver the years, groups as divergent as the Ku Klux Klan and the United Way have held rallies and sponsored speeches in the square." Pet. App. A6. Access to such arenas to engage in speech is a fundamental right rather than a privilege bestowed by government.[2]

Several of this Court's seminal decisions protecting freedom of speech involved viewpoint discrimination against religious speech in public parks. *See Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (striking down state's refusal to allow Jehovah's Witnesses to preach in public parks when other groups had been allowed to meet); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (same, where other groups including Order of Elks had been permitted to meet). These and other of the Court's precedents do not countenance the glaring imposition upon free speech rights involved in this case. *See, e.g., Hague, supra; Carey v. Brown*, 447 U.S. 455 (1980) (striking down ordinance barring picketing in public forum); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (invalidating city's selective prohibition of certain picketing in public forum). When civil rights demonstrators engaged in political and religious speech and singing at the South Carolina State House, this Court recognized that such

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[2] A more extreme version of Petitioners' devaluation of the right to speak in a public forum is found in the brief *amicus curiae* of the Town of Trumbull, Connecticut and the Connecticut Civil Liberties Union Foundation. This brief (at p. 3) declares that government respect for this right is tantamount to a "cash subsidy." It is indeed a sad day when an affiliate of the American Civil Liberties Union sees no difference between exercising fundamental First Amendment freedoms and receiving government largesse.

peaceful expression "at the site of the State Government" was "an exercise of these basic constitutional rights in their most classic and pristine form."

This Court's decisions have recognized the significance of the Free Speech interests at stake in this case by applying a very stringent standard to content-based restrictions upon private speech in a traditional forum. *See, e.g., International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). These cases impose a heavy burden upon Petitioners to justify their very real abrogation of First Amendment rights. As discussed below, Petitioners' invocation of attenuated Establishment Clause concerns plainly does not justify the content-based total exclusion of religious symbols they propose.

II. THE ESTABLISHMENT CLAUSE DOES NOT JUSTIFY PETITIONERS' VIOLATION OF RESPONDENTS' FIRST AMENDMENT RIGHTS.

A. A Government's Refusal to Censor Protected Private Speech Does Not Even Implicate the Establishment Clause.

The rule adopted by the court of appeals in this case is both simple and correct. Private religious speech in a public forum is just that: *private* speech. It is protected by the Free Speech and Free Exercise Clauses and should never give rise to a reasonable inference of government

sponsorship that would require prohibiting it under the Establishment Clause.[3]

Given that this case undeniably involves private speech, it does not require the Court to determine what sorts of government aid to religion violate the Establishment Clause (is "non-coercive" aid permissible, or is any "endorsement" or approval of religion forbidden).[4] The central point in this case is not what kind of religious speech or action by government is prohibited. It is the

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[3] Petitioners and their *amici* erroneously characterize the lower courts' reliance upon these principles as a *per se* rule. In reality, the court of appeals, for instance, declared that the facts that the " 'display is privately sponsored, and it stands in a traditional public forum are *not automatically determinative*, but recent precedent indicates that they should *carry much more weight* than the details of the display emphasized by the [petitioners].' " 30 F.3d 675, 679, *quoting Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1545 (6th Cir. 1992) (*en banc*) (emphasis added); 844 F. Supp. 1182, 1186-87 (S.D. Ohio 1993).

Instead, it is Petitioners and their *amici* that advocate a *per se* rule, contending that the Establishment Clause forbids "any isolated, unattended display of a purely religious symbol at the seat of government." (Pet. Br. at 12).

[4] To be sure, if the clause prohibits only government "coercion" to practice religion, *see, e.g., Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) ("at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion"), *County of Allegheny v. ACLU*, 492 U.S. 573, 659-660 (1989) (Kennedy, J., concurring), then government does not violate it by permitting a private group to erect a display in a forum where numerous other groups are free to speak. *See, e.g., Mergens*, 496 U.S. at 261-262 (Kennedy, J., concurring in the judgment) (voluntary student religious club is not coercive).

fact that there is no religious speech or action by government in the first place: Petitioners' Establishment Clause concerns arise when government merely fails to censor private religious speech.

Thus, the result is no different under the rule that the Establishment Clause requires government to avoid non-coercive "endorsements" of religion (that is, to remain strictly "neutral" toward religion): the display still cannot be suppressed. Under the endorsement analysis, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality opinion).

B. This Court's Equal Access Cases Control the Outcome of This Case.

This Court has repeatedly held that the Free Speech Clause guarantees religious groups the right to equal access to expressive fora open to other groups, and that to give such access conveys no message of government endorsement of religion. In *Widmar v. Vincent, supra*, the Court held that a public university could not exclude a student group from meeting in school facilities on the basis of the religious content of the group's discussions, when such facilities were open to other student groups. *Widmar*, 454 U.S. at 267-270, 277. In *Lamb's Chapel v. Center Moriches School Dist., supra*, the Court unanimously held that a religious group could not be denied use of a public school auditorium after school hours when that property

had been opened to a "wide variety of private organizations" to speak on "social or civic" subjects. *Lamb's Chapel*, 113 S. Ct. at 2148. And in *Mergens*, the Court upheld the Equal Access Act, which prohibits public high schools that receive federal funds and have an "open forum" for student clubs to discriminate against any student club on the basis of the religious, political, or other content of its speech. *Mergens*, 496 U.S. 226.

In each of those cases, opponents of equal access trotted out the same arguments they do today: some student or member of the community might see the religious speech on public property and infer that the government promotes or endorses that speech. In each case the Court soundly rejected the argument. In *Widmar*, the Court pointed out that "[u]niversity students are . . . young adults . . . and should be able to appreciate that the University's policy [in maintaining an open forum] is one of neutrality toward religion." 454 U.S. at 274 n.14. In *Mergens*, the Court found that the "proposition that schools do not endorse everything they fail to censor is not complicated," and that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250; *id.* at 261 (Kennedy, J., concurring). And in *Lamb's Chapel*, the Court unanimously held that nondiscriminatory access for religious groups would create "no realistic danger that the community would think that the District was endorsing religion or any particular creed." 113 S. Ct. at 2148.

Indeed, the Court has recognized that to single out displays reflecting religious views for censorship – to

"refuse[ ] to let religious groups use facilities open to others" – "would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 250; *cf. id.* at 261 (Kennedy, J., concurring) (arguing that eliminating religious views "may result in neutrality in name but hostility in fact").

Remarkably, Petitioners themselves seem to concede this important point. They argue that putting a sign on a religious display to disclaim government endorsement (as was done here) is an inadequate compromise because "[t]here is a fine line between nonapproval and disapproval in the minds of many people" and therefore "[a] sign that communicates the government's complete noninvolvement could be interpreted as being hostile to religion." Pet. Br. 48. Common sense would suggest that if people might perceive hostility or disapproval from such a disclaimer, they will almost certainly perceive hostility and disapproval if the government refuses to permit the display altogether.

It is important to note that these broad principles of equal access have been declared in the context of public schools, where "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause" (*Edwards v. Aguillard*, 482 U.S. 578, 583-584 (1987)). If nondiscriminatory access for religious speech creates no reasonable perception of endorsement in the schools, then it even more clearly creates no such endorsement in the context of a public square or park, the "quintessential public forum" (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The same is true, in particular, for the grounds of a state capitol. *See Edwards v. South*

Carolina, 372 U.S. 229, 235 (1963) (reversing demonstrators' convictions for breaching the peace by protesting on grounds of state capitol).

C. A Private Display in a Public Park Does Not Violate Any Articulation of the Establishment Clause.

Even if the Establishment Clause applies at all to protected private speech and if this Court's equal access decisions are not deemed controlling, the Establishment Clause nonetheless does not justify Petitioners' suppression of speech. This conclusion is inevitable under any conception of the Establishment Clause.

As *amicus* Christian Legal Society has stated in prior briefs, the primary value underlying the Establishment Clause is government neutrality toward religion.[5] Government action does not violate the Establishment Clause unless it accords religious institutions or activities preferential treatment over nonreligious activities in a way that induces religious exercise. The religion clause "require[s] government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion should be left as wholly to private choice as anything can be." Douglas Laycock, *Formal, Substantive,*

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[5] For a fuller discussion of *amicus* Christian Legal Society's proposed refinement of the Establishment Clause analysis, see its *amicus curiae* briefs in *Rosenberger v. The Rector and Visitors of the University of Virginia*, No. 94-329, pp. 7-8; *Board of Education of the Kiryas Joel Village School District*, No. 93-517, p. 3; and *Zobrest v. Catalina Foothills School District*, No. 92-94, p. 20.

and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001-02 (1990).

Putting aside for the moment the Free Speech Clause's prohibition on excluding Respondents from a traditional public forum, the relevant question is whether that exclusion is the more neutral course of action. To ask such a question is to answer it: singling out religious symbols for exclusion clearly is not government neutrality towards religion. Treating a religious message like all other messages plainly does not constitute a preference that induces observers to engage in religious activity. To the extent that displaying a cross in a public park recruits adherents to the Christian faith, such effect is attributable to private speech; the government's failure to suppress that private speech cannot reasonably be deemed the cause of such conversions.

Petitioners and their *amici* implicitly suggest that the "endorsement" test requires a court to ask a different set of questions than those indicated by the neutrality approach. Despite the questionable merit of that suggestion, it remains clear that the Establishment Clause is not violated under Petitioners' conception of the proper test.

The endorsement analysis requires a determination whether a "reasonable" or "objective" observer would view the display as endorsing religion. *See, e.g., County of Allegheny*, 492 U.S. at 620 (Blackmun, J.); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). Just as this "objective observer" must be "acquainted with the Free Exercise Clause and the values it promotes" (*Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring)), so any "objective" or "reasonable" observer must be held to be familiar

with the values underlying the Free Speech Clause. Reasonable observers should realize that the very purpose of a public square or park is for communication and assembly by citizens. In addition, reasonable observers should know the principle that the religious speech of private citizens is protected, and that governments "do not endorse everything they fail to censor." *Mergens*, 496 U.S. at 250. Given this knowledge, a reasonable observer should conclude that religious expression among other forms of expression in a public park or square is not the government speaking, but is simply citizens engaging in the time-honored practice of speaking themselves.

Like opponents of equal access in previous decisions, Petitioners and their supporting *amici* try to justify censorship by arguing that this situation is different from all the previous ones. They focus on two features: the unattended nature of the display and its location in front of the state capitol. *See, e.g.*, Pet. Br. 9.

Petitioners offer scant evidentiary support for their implausible claim about what observers will perceive, in large part simply speculating that "everyone" will conclude that government endorsed the religious display.[6] Such misperceptions, even if they would actually occur,

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[6] The only evidentiary support cited in Petitioner's brief is the testimony of a single witness who suggested that one might infer that government supported a United Way display. The witness also testified that "if I had heard that the state did not allow it, that that would indicate a disapproval." (Joint Appendix at 161). Other than one person's speculation about the effect of a different display, Petitioners cite no factual evidence for their naked assumption that "everyone" would perceive a religious display to be publicly sponsored.

are just not "reasonable" and certainly should not justify suppressing speech in a public forum. Petitioners assume that observers will be unaware of many of the facts crucial to determining endorsement. For example, the "observer" that Petitioners posit does not know who has erected and paid for an unattended display, and simply assumes that such a display was erected by the landowner. Pet. Br. 9, 15.[7]

The observer also does not know about the message on the sign attached to the display in this case, which stated that the cross was erected by a private group and was not endorsed by the state. *See* Pet. Br. 46-47 (arguing that disclaimer sign could not be seen from a distance and could not be "understood by children, the non-English speaking, or the illiterate"). This Court long ago held that government cannot "reduce the adult population of Michigan to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Neither can Ohio reduce speech at the state capitol to only what will not confuse children and illiterates.

Moreover, the kind of ignorance that Petitioners assume is inconsistent with this Court's decisions, which indicate that the reasonable observer should be held to be

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[7] Comparing a public park to a private citizen's land (which Petitioners do to support their implausible contentions about what a spectator would observe) is totally inappropriate. There is surely a difference between public land that has "immemorially been held in trust for the use of the public," *Hague*, 307 U.S. at 515, and private property. That a third party might infer that a private landowner endorses a message displayed on his property says absolutely nothing about what a third party might infer from a display in a traditional public forum.

familiar with all the facts of the case. If, as Justice O'Connor has said, "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice" (*County of Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring)),[8] then the "reasonable observer" must know all those circumstances. Thus in *Widmar*, for example, the Court assumed that university students would be aware not only that a large number of student organizations met on campus, but also the less obvious fact that the university had a policy, reflected in its student handbook, that its name "not 'be identified in any way with the aims, policies, programs, products or opinions of any organization or its members.' " *Widmar*, 454 U.S. at 274 n.14 (quoting university handbook). And in *Lamb's Chapel*, the Court assumed that "the community" would know that the church group's meeting "would have been open to the public, not just to church members," as well as that "[t]he District property had repeatedly been used by a wide variety of private organizations." *Lamb's Chapel*, 113 S. Ct. at 2148.

It is ironic, therefore, that Petitioners attack the Sixth Circuit's so-called "per se" approach for "fail[ing] to engage in an evaluation of 'all the relevant facts.' " Pet. Br. 21. It is Petitioners who make selective assumptions about what an observer will and will not know – assumptions all designed to lead to the conclusion that observers will misperceive private speech as government speech.

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[8] Accord *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

Many of the misperceptions Petitioners suggest can easily be dispelled if the reasonable observer makes simple inquiries before assuming that government sponsors a religious display in the public park. The observer can see that there are other, possibly conflicting, symbols elsewhere in the forum (for example, in this case, the menorah that stood near the cross in Capitol Square). The observer can also read any sign (such as the one here) that makes it clear that a display is erected and funded by a private group rather than by the government. Finally, the observer can find out whether a private group erected or paid for the display, whether many other forms of expression have been permitted on the property, and so forth. The remedy for arguably misleading speech is more speech, not censorship; the remedy for misinformed observers is more and better information, not censorship.[9] Otherwise, as Judge Easterbrook has put it, to focus on such misimpressions "create[s] an obtuse observer's veto [over religious speech], parallel to a heckler's veto over unwelcome political speech." *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (en banc) (Easterbrook, J., concurring).

If the kind of misperceptions suggested by Petitioners are legitimate, then there is no basis for the distinction Petitioners try to draw between "live" meetings

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[9] "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (mistaken identification of particular speaker's views with those of property owner remedied by owner's public disclaimer).

and an unattended display. The misimpressions of an "obtuse" observer could also have justified suppressing the live religious meetings that were protected in *Widmar, Mergens,* and *Lamb's Chapel*. One can imagine that some visitor to the school buildings in *Lamb's Chapel*, or to the university campus in *Widmar*, might happen upon a religious group using the facilities and, seeing only that meeting, wrongly jump to the conclusion that it was officially endorsed by the school. Or some uninformed observer passing Capitol Square might see a speaker holding up a Bible at a podium in front of the capitol and wrongly jump to the conclusion that it was the governor delivering a sermon, rather than a local minister.[10]

Petitioners are also highly selective in suggesting facts as to which the "reasonable" observer will be ignorant. The *en banc* Sixth Circuit, in a case where plaintiffs challenged a private group's display of a menorah, has cataloged the methods by which opponents of equal access manipulate the "objective observer" test – methods that Petitioners here also use. *See Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1550 (6th Cir. 1992) (en banc). For example,

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[10] Indeed, as the *en banc* Sixth Circuit has noted in another case, opponents of displays might argue that a display accompanied by an actual service or ritual conveys *more* endorsement than a display standing alone. *Americans United for Separation of Church and State* v. *City of Grand Rapids*, 980 F.2d 1538, 1549 (6th Cir. 1992) (en banc) (holding that unattended private display of menorah in public square need not be suppressed to avoid Establishment Clause violation). The Sixth Circuit opinion in the current case relies heavily on the *en banc* decision in *Americans United*. Pet. A8-A9.

"[t]he plaintiffs' observer does not follow local politics or controversies, or read the newspapers where this issue has been discussed," or else he might read that the government has specifically disclaimed any endorsement of the display; "however, the plaintiffs' observer does go downtown where the menorah can be seen." *Id.* "Further, the plaintiffs' observer must come close enough to realize that there are no persons associated with the menorah" – since (under Petitioners' argument) it is only when the display is unattended that the observer assumes it has been erected by the state. "However, the plaintiffs' observer must not come close enough to read the sign" on the display disclaiming state endorsement, for the sign would dispel any misperceptions. *Id.*[11] As the Sixth Circuit aptly recognized, such manipulation shows why

> the reasonable observer used in the resolution of these cases must be an observer in possession of all the relevant facts. Once it is admitted that the observer is ignorant in some areas, there is no objective means of deciding who gets to make up the components of the observer's knowledge.

Americans United, 980 F.2d at 1550 n.7.

It is not just an abstract exercise to require that the "reasonable" observer be held to inquire about and know

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[11] *Amicus* does not mean to suggest that a disclaimer sign is indispensable to dispel all reasonable perceptions of endorsement. In most cases, there are additional sources (the well-known history of the forum's use, media, other citizens) that provide information such as the private funding of the display and the open nature of the forum. However, a disclaimer on the display should remove even the slightest bit of doubt.

such facts. Incorporating such facts into the analysis is crucial to ensuring that the goal of preventing establishment does not unjustifiably silence religious speech. Pointing to the ignorance of some observers, Petitioners and other opponents of equal access demand a rule to ensure that no one could possibly perceive, even through ignorance or stubbornness, a state endorsement of religion. But such a prophylactic rule guards against *perceived* support for religion by engaging in *actual* suppression of religion. It "demonstrate[s] not neutrality but hostility toward religion" (*Mergens*, 496 U.S. at 248 (O'Connor, J.)). As one scholar has noted:

> [A] solution in which one side bears all of the risk of [citizen] misunderstanding while the other side bears none is not a neutral solution. The risk of misunderstanding must be shared. It is best shared by facially neutral rules in which the government takes no position on religion in its own speech and treats private religious speech exactly like private secular speech. Whatever the risk that some [citizens] will perceive an open forum as an endorsement of groups that participate, that risk is far outweighed by the actual and apparent hostility in a rule that allows [citizens] to talk about anything except religion.

Laycock, Douglas, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 20 (1986).

Indeed, Petitioners and their supporting *amici* explicitly minimize the interests in free religious speech and exercise here. Some *amici* suggest, for example, that "there is no need to place sacred symbols of any faith in

public areas" because "[t]here is abundant private property available for [such public display[s]," such as churches and private homes. Brief of Americans United *et al.* at 2. But it is completely inconsistent with the First Amendment to suggest that a viewpoint may be excluded from a public forum because it could be expressed elsewhere. Like the streets that were the subject of *Schneider v. State*, 308 U.S. 147 (1939), the public parks and squares are "natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163; *see also Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Contrary to the assertions of *amici* (Brief of Americans United *et al.* at 2), the reason religious citizens go to the state capitol grounds to speak is not necessarily to receive "official endorsement." Like many other speakers, they simply want to express their views at a place with a large audience, and to affirm that their views are relevant to and should be considered in public life.[12]

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[12] In any event, the reason why a private speaker chooses the place to speak or to speak at all is irrelevant. Under the endorsement test, the issue is the *government's* intent or effect in acting. *See County of Allegheny*, 492 U.S. at 593 (Establishment Clause " 'precludes *government* from conveying or attempting to convey a message' " of favoritism) (emphasis added) (quoting *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring)).

D. Petitioners' Novel "Subjective Observer" Theory Would Seriously Damage Both Religious Liberty and the Institutional Integrity of the Judiciary.

Petitioners would impose upon the courts "the obligation . . . to determine the nature of the message being sent *and received*" by Petitioners' "reasonable" observer. (Pet. Br. 9) (emphasis added). As one *amici* describes its position: "[I]t is not necessary that a reasonable observer *would* perceive the governmental action as connoting endorsement or disapproval, for reasonable people will often differ; rather, the government has erred whenever a reasonable person *could* perceive its action as connoting endorsement or disapproval." (Br. *Amici Curiae* Trumbull, Connecticut, *et al.*, 11-12) (original emphasis). Nor does Petitioners' test envision one prototypical reasonable observer; instead *any* reasonable observer's misperception will trigger censorship of private religious speech. In the words of another of Petitioners' *amici*, "it is sufficient, as we will emphasize again, that *a* "reasonable observer" *might* draw the inference, or, indeed, that *some portion* of the reasonable observers in the community *might* so infer." (Br. *Amici Curiae* American Jewish Congress and Anti-Defamation League 4) (emphasis added in part). They would make this case turn on the most foolish and *unreasonable* of "reasonable" observers.

This novel, untested version of the "reasonable observer" that Petitioners and their *amici* press upon this Court is a deeply troubling one for a number of reasons. At bottom, Petitioners urge this Court to substitute a highly *subjective* "reasonable observer" for the *objective* factfinder used as the model reasonable observer by

members of this Court in the past. For Petitioners, a subjective "reasonable" observer's misperception, rather than factual reality, defines the limits of other private citizens' exercise of fundamental rights.

Of course, the immediate question raised by such an overtly relativistic approach to constitutional decision-making is why the allegedly "reasonable" observer's subjective feeling, *i.e.*, that the government is endorsing religious speech when it is not, is any more valid than the next "reasonable" observer's subjective feeling, *i.e.*, that the government is not endorsing religious speech. Merely asking the question reaffirms the commonsense approach in which the reasonable observer is the objective fact-finder – a person presumed to know all of the facts in the situation and to understand the basic constitutional principles that all citizens should know in a pluralistic democracy. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 632 (1989) (O'Connor, J., concurring) (reasonable observer is well informed and evaluates in light of the relevant history and context); *Wallace v. Jaffree*, 472 U.S. 38, 76, 83 (1985) ("objective observer, acquainted with the text, legislative history, and implementation of the statute;" "objective observer . . . is acquainted with Free Exercise Clause and the values it promotes"); *see also, Kreisner v. City of San Diego*, 988 F.2d 883, 892 (9th Cir. 1993); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1390 n.11; *id.*, at 1396 (Anderson, J., concurring).

But Petitioners prefer a reasonable observer who is presumed to be ignorant rather than informed. For example, a touchstone of our constitutional liberties is the basic understanding that the Constitution is a restraint on the government, not on citizens, and that the First

Amendment protects individual expression and activity. But, in order to prevail, Petitioners must collapse the vital distinction between private speech and government speech, a distinction at the heart of the Constitution and numerous decisions of this Court. *See, e.g., Mergens*, 496 U.S. at 250; *Widmar*, 454 U.S. at 271 n.9; *Lamb's Chapel*, 113 S. Ct. at 2148; *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

Unpredictability is the hallmark of a subjective test. When the reasonable observer is presumed to recognize the distinction between private speech and governmental speech, the religious speaker has a fairly good sense whether his or her speech is permissible in a public location. But the subjective test introduces a "roving censor" into the equation, in the form of the subjective "reasonable" observer. The religious speaker can no longer rely on the *objective fact* that his or her speech is private but must worry whether any passerby might, out of ignorance or malice, claim to misunderstand and attribute his or her speech to the government. The religious speaker, not the uninformed censor, pays for the censor's mistake.

Furthermore, the subjective test greatly increases the likelihood that the censor will not be an uninformed private citizen at all but a government bureaucrat. If this Court were to adopt Petitioners' test, numerous public officials across the country would immediately use the new test to deny religious speakers access to traditional public fora, as well as limited public fora and nonpublic fora. Most of the decisions regarding access for religious speakers to public property are not made by judges but

by local and state officials, some of whom are not predisposed to treat religious persons in a neutral manner. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2222 (1993) ("laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom"); *Larson v. Valente*, 456 U.S. 228, 254 (1982) (law "drafted with the explicit intention of including particular denominations and excluding others"); *Fowler*, 345 U.S. at 527 (local officials denied religious group access to park because of hostility toward their particular religious beliefs); *Niemotko*, 340 U.S. at 272-273 (same). The subjective observer test gives any "village tyrants," *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-638 (1943), a virtually unchallengable rationale for denying permits to religious speakers.

Indeed, in the final analysis, the subjective observer test is not a test at all, for it gives no definable standards for determining constitutionality – other than the presuppositions of the government decisionmaker. *Cf. Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance that prohibited conduct that was "annoying to persons passing by" unconstitutionally vague because it subjects First Amendment right to "an unascertainable standard"). For over fifty years, this Court has condemned as unconstitutional a licensing system that places unbridled discretion in the hands of government bureaucrats to determine which religious speakers may or may not speak. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 305-307 (1940). Petitioners' subjective observer theory is a thinly veiled

means of giving government officials arbitrary discretion to discriminate against religious persons.

Nor does such unbridled discretion require that government officials be malicious toward the religious applicant. Many government officials are not intentionally hostile to religion, or to particular religions, but simply wish to avoid any controversy and take the "easy way [by] suppress[ing] private speech." *Hedges v. Wauconda Community School Dist.*, 9 F.3d 1295, 1299 (7th Cir. 1993) (holding unconstitutional school officials' suppression of students' religious speech); *see also, e.g., Lamb's Chapel*, 113 S. Ct. at 2148; *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993). Many government officials still mistakenly believe that all religious speech on public property is unconstitutional and view it as their duty to prohibit any religious speech. Unfortunately, public officials are often subconsciously influenced by their own personal religious (or anti-religious) biases. Officials' responses to requests for access may depend on their "comfort with mainstream religious views and discomfort with and perhaps hostility towards non-mainstream, non-traditional religious messages." *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 693 (2d Cir. 1991) (holding unconstitutional local officials' denial of access to evangelical Christian speaker). A primary function of both the Establishment and Free Exercise Clauses is to protect citizens from the religious (or anti-religious) biases of public officials, regardless of whether the officials are acting from malice, aversion to controversy, or unexamined personal predilections.

Both the unpredictability and the potential for abuse of discretion created by Petitioners' new test would have

a dramatic chilling effect on the religious speech of private citizens. Religious citizens must anticipate that each attempt to engage in religious speech in a traditional public forum may result in lengthy, and unpredictable, litigation to determine whether some *unidentified* observer *could* possibly fail to understand that their speech is their own rather than the government's. Nor will the religious citizen be able to respond effectively to the bureaucrat who denies his or her permit to speak in the traditional public forum on the unchallengeable basis that the bureaucrat "just knows" that some unknown person will mistakenly attribute her speech to the government.

Such a chilling effect becomes the quintessential "heckler's veto" warned of by numerous lower courts in recent religious speech cases. Analogizing to the "hecklers' veto," the Sixth Circuit noted below, "We believe that the [defendants'] argument presents a new threat to religious speech in the concept of the 'Ignoramus's Veto.' " 30 F.3d at 679, *quoting Americans United*, 980 F.2d at 1553. Similarly, the Seventh Circuit has seen the parallel between the subjective observer and the forbidden "heckler's veto." *See, e.g., Hedges*, 9 F.3d at 1299-1300. *See also Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1390 n.11 (11th Cir. 1993).

Petitioners' proposed test is not only a disaster for the liberties of religious citizens; it also threatens the efficiency and credibility of the judiciary. First, its inadministrability is apparent. In court, the religious speaker must prove a negative argument that is impossible to prove, *i.e.*, that no person who ever witnesses her expression will mistakenly attribute it to the government. How

is a citizen to prove that proposition? Must the religious speaker depose every member of the community? Does the "reasonable" observer include "children, the non-English speaking, or the illiterate," as Petitioners suggest? (Pet. Br. 46). Given that Petitioners are also concerned about tourists to Capitol Square, the potential field of observers broadens to include the entire world. (Pet. Br. 48).

Similarly, if the burden of proof rests on the government, will the government have proved its case if only *one* witness can be found to testify that she would misperceive the speaker's identity? As already noted, one of Petitioners' *amici* would find an Establishment Clause violation if a single "reasonable" observer would have such a misperception. Or would the government be required to prove that at least 51% of the population (whether of Columbus, Ohio, or the entire world) would misunderstand the source of the speech? What proportion of misperceiving observers is necessary to prove unconstitutionality? Such litigation would be exceedingly lengthy and expensive.

More importantly, the Petitioners' test would reflect adversely upon the integrity of the judiciary itself. The prime function of the courts is to determine and uphold in all cases their best judgment of what the law and the facts actually are. But under Petitioners' obtuse Establishment Clause jurisprudence, the courts would treat as an Establishment Clause violation that which even Petitioners admit would not constitute a true violation of the Establishment Clause. The courts can ill-afford to squander their institutional reputation for integrity by adopting Petitioners' theory. The judiciary comes under enough

attack for enforcing the Establishment Clause in cases in which genuine violations have occurred, without enforcing the Establishment Clause to censor private citizens' religious speech in situations in which all knowledgeable persons understand that a violation of the Establishment Clause has not occurred.

As precedent proves, the only safe harbor for the courts and religious liberty is true neutrality. The model applied for the reasonable observer must be an objective, knowledgeable, logical citizen, who understands the fundamental distinction between private speech and governmental speech – that private religious speech is protected by the First Amendment and governmental religious speech is circumscribed by the First Amendment. The objective observer knows the relevant circumstances of a case and applies logic, rather than subjective feelings, to evaluate those facts. This objective observer understands that the government is treating religion in the neutral manner commanded by the Constitution when it allows private religious speech in a traditional public forum. This reasonable observer understands that the remedy for disagreeable speech is not suppression of the other person's speech but adding her own voice to the public debate.

CONCLUSION

In this case, Petitioners seek this Court's imprimatur on its content-based suppression of private speech in a traditional public forum. They propose that fundamental rights turn on the feelings of hypothetical third party

observers – observers who are ignorant enough to make false assumptions and so uninterested that they do not pursue truth. Protecting this class of ignorant and apathetic hypothetical observers does not justify the actual discriminatory suppression of religious speech. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

INTEREST OF *AMICUS CURIAE*

Amicus' participation in this case reflects its commitment to freedom for all religious views, and not any sympathy for the views espoused by the Ku Klux Klan. *Amicus*, an organization of Christians in the legal profession, deplores the ways in which the Klan has historically misused the symbols of Christianity to communicate messages of hate and to accompany both threatened and actual violence. We agree with the district court's sentiment (Pet. App. A26) that "[i]t is ironic and in the most literal sense diabolical that [the Klan] would seek to publicly display the symbol of Jesus of Nazareth," whom *amicus'* members regard as the Prince of Peace.

For over a century, the Klan victimized our black brothers and sisters. It would be doubly tragic if their activities today were to cause those same victims, as well as all religious citizens, to lose their right to communicate religious messages in a public forum. As explained in the Introduction to our arguments, *supra*, the issues in this case have no reference to the particular beliefs of the Ku Klux Klan. Petitioners' arguments for censoring the display of the cross apply equally to any unattended religious symbol in a public forum, barring such symbols based on unrealistic fears that the government might be seen as endorsing the religious message because it permits it. Because that argument undercuts the very foundations of free religious speech, this Court must reject it.

The **Christian Legal Society,** founded in 1961, is a nonprofit ecumenical professional association of 4,700

Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* joined by many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of

state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious expression.